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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. HUBERT WASHINGTON, Appellant.	2 CA-CR 2009-0098 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20080469

Honorable Teresa Godoy, Judge Pro Tempore

AFFIRMED

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H O W A R D, Chief Judge.

¶1 Following a jury trial, appellant Hubert Washington was convicted of two counts of sexual assault and sentenced to consecutive prison terms totaling twelve years and three months. On appeal, Washington challenges the trial court's denial of his motion to strike the jury panel for cause, its preclusion of potential consent evidence, and its inclusion in a jury instruction of language regarding mental capacity and consent. For the reasons that follow, we affirm Washington's convictions and sentences.

Facts and Procedural History

¶2 "We view the facts in the light most favorable to sustaining the convictions." *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). Washington gave the victim, his cousin, a ride and engaged in a series of sexual acts with him. The acts took place in a van and at an apartment, in the shower and on the bed. The victim repeatedly told Washington that he did not want to engage in the behavior and tried to push him away. After Washington dropped him back off near his place of work, the victim called the police and reported the attacks. Washington was charged with three counts of sexual assault, and a jury found him guilty on two of those counts. This appeal followed.

Jury Selection

¶3 Washington first argues that the trial court erred by denying his motion to strike the entire jury panel for cause because, during voir dire, one juror said in the presence of the entire panel that thinking about this case made her "very ill." We review a trial court's rulings during voir dire of prospective jurors for abuse of discretion. *State v. Glassel*, 211 Ariz. 33, ¶ 36, 116 P.3d 1193, 1205, *corrected in part on other grounds*

by 211 Ariz. 370, 121 P.3d 1240 (2005). "Unless the record affirmatively shows that a fair and impartial jury was not secured, the trial court must be affirmed." *State v. Greenawalt*, 128 Ariz. 150, 167, 624 P.2d 828, 845 (1981). And the party challenging the panel has the burden of showing "that the jurors could not be fair and impartial." *State v. Davis*, 137 Ariz. 551, 558, 672 P.2d 480, 487 (App. 1983).

¶4 Washington speculates that the juror's comment invited the panel to "start thinking viscerally" about the case so that, in conjunction with the prosecutor's comments in closing argument that the jury could "protect" the victim, the jurors could have been improperly swayed by their emotions. But each juror who sat on the case agreed to be fair and impartial in reaching his or her decision. Washington does not provide any evidence that the jury was not fair and impartial, and we will not "indulge in an assumption . . . that the panel was tainted." *Davis*, 137 Ariz. at 558, 672 P.2d at 487. We see no abuse of discretion in the trial court's refusing to strike the entire jury panel.

Preclusion of Evidence

¶5 Washington also asserts that his constitutional rights to confrontation and cross-examination were violated when the trial court precluded evidence that the victim had an erection during the incident in the van. We review the trial court's rulings on the relevance and admissibility of evidence for an abuse of discretion. *State v. Aguilar*, 209 Ariz. 40, ¶ 29, 97 P.3d 865, 874 (2004); *State v. Jeffrey*, 203 Ariz. 111, ¶ 13, 50 P.3d 861, 864 (App. 2002).

¶6 Washington contends that evidence of the victim's erection was relevant to his defense of consent. When his counsel asked the victim on the stand whether the

victim's penis had been erect during the sexual act in the van, the state objected on the ground that it was not relevant. The trial court sustained the objection.

¶7 Because Washington was acquitted of the charge based on events in the van, any error in rejecting evidence of consent as to that count would be harmless. *See State v. Barr*, 183 Ariz. 434, 441, 904 P.2d 1258, 1265 (App. 1995) (exclusion of evidence relevant only to count on which defendant acquitted not reversible error). Washington did not seek to admit evidence concerning the victim's having had an erection during the separate, later acts that resulted in the two counts of conviction. And Washington does not attempt to show how precluding evidence of the victim's erection in the van pertains to whether the victim consented to the subsequent acts. Therefore, any such argument is waived. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (issue waived when insufficient argument presented for appellate review).

¶8 Moreover, the victim testified that he had ejaculated during the act on the bed, so an erection would have been presumed for count three. Thus, any error would clearly have been harmless. Ariz. Const. art. VI, § 27; *State v. Dunlap*, 187 Ariz. 441, 456-57, 930 P.2d 518, 533-34 (App. 1996) (preclusion of cumulative testimony harmless error). Washington has failed to show any reversible or fundamental error in the preclusion of the evidence. *See State v. Dickens*, 187 Ariz. 1, 14, 926 P.2d 468, 481 (1996) (fundamental right to present defense constrained by rules of evidence).

Jury Instruction

¶9 Washington further argues that the trial court erred by instructing the jury on lack of consent by reason of mental defect or disorder because no evidence supported

that instruction. "We review the trial court's decision to give or refuse a jury instruction for an abuse of discretion." *State v. Hurley*, 197 Ariz. 400, ¶ 9, 4 P.3d 455, 457 (App. 2000). Giving a jury instruction on mental capacity is reversible error when there was not sufficient evidence presented at trial to merit the instruction and "[w]here there is the possibility that the defendant was convicted on deficient jury instructions." *State v. Johnson*, 155 Ariz. 23, 26, 745 P.2d 81, 84 (1987). For such an instruction to be warranted, the "[state] must prove that the mental disorder was an impairment of such a degree that it precluded the victim from understanding the act of intercourse." *Id.* We conclude that the instruction was not warranted but that the error was harmless.

¶10 Washington was charged with three counts of sexual assault, and the jury was instructed that a conviction would require proof that there had been sexual contact "without the consent" of the victim. *See generally* A.R.S. § 13-1401(5) (defining "[w]ithout consent"). The court instructed the jury that "without consent" includes circumstances in which "[t]he victim is incapable of consent by reason of mental disorder, mental defect, drugs, alcohol, sleep or any other similar impairment of cognition." The jury was further told that mental defect "means the victim is unable to comprehend the distinctively sexual nature of the contact or is incapable of understanding or exercising the right to refuse to engage in the conduct with another."

¶11 The limited evidence of the victim's mental capacity in this case does not meet the threshold set forth in *Johnson*. *See* 155 Ariz. at 26, 745 P.2d at 84. The only direct comments regarding the victim's mental capacity were made by Washington to a police officer after the accusations had been made against him. Washington stated that

the victim had "severe" mental issues, needed to be "monitored," and needed medication; he added that he thought the victim was prone to making "a lot of accusations" and might be "schizophrenic." Washington did not claim that the victim did not understand the nature of sexual acts.

¶12 The victim testified that he has some physical disabilities—cerebral palsy, seizures and visual impairment in one eye—and that he has taken medication for them, but no attempt was made to elicit information about the victim's mental capacity during his testimony. Moreover, after the victim appeared confused on the stand during direct examination by counsel for Washington, the state on cross-examination eliminated any confusion by eliciting answers that the victim clearly knew what had happened and had said "no" repeatedly. His testimony overall showed a clear understanding of the sexual nature of the acts. The lack of evidence presented about the victim's mental capacity and his repeated demonstration that he had not consented to the acts compel the conclusion that the state did not present sufficient evidence of the victim's mental capacity to warrant a jury instruction about it.

¶13 The state argues to the contrary, pointing out the victim had a limited vocabulary on certain sexual subjects and went "off on tangents when he spoke to [the nurse who conducted the sexual assault exam]." However, the victim clearly had sufficient vocabulary to describe what had happened during the attacks, even if he may not have known the terms for the acts themselves. And, although the nurse did state that "[s]ome of his thoughts would move in . . . a tangential pattern," she also added that "a lot of us" do the same thing "when we are trying to recall" events. Even if this were not

the case, the nurse's testimony that the victim had some tangential thoughts is certainly not sufficient evidence of mental incompetence to warrant the jury instruction.

¶14 The state attempts to distinguish *Johnson* by stating that the current version of § 13-1401(5)(b) is more expansive than the version considered in *Johnson*. It first states that only "mental disorder," and not "mental defect," was in the older version of the statute. However, the test for mental incompetence in *Johnson* mirrors the current statutory definition of "mental defect," used in the instruction in this case; both turn on whether the victim has the capacity to understand the nature of the conduct. *See* § 13-1401(5)(b); *Johnson*, 155 Ariz. at 25-26, 745 P.2d at 83-84. The state also asserts that the earlier statute was more expansive because it stated "'without consent' means" as opposed to "includes." *See State v. Witwer*, 175 Ariz. 305, 307, 856 P.2d 1183, 1185 (App. 1993) (holding "'without consent' is not limited to the definitions listed in" § 13-1401(5)). But the state only raised the issue of mental defect, which is specifically defined by the statute. *See* § 13-1401(5)(b). Therefore, even if other situations could give rise to lack of consent, they do not expand the definition of mental defect. And the state does not suggest what other forms of lack of consent could justify the instruction here. Because none of the other elements added to the post-*Johnson* statutory definition is involved here, this argument is without merit. *See id.*

¶15 Nonetheless, we "'will not reverse a conviction if an error is clearly harmless.'" *State v. Green*, 200 Ariz. 496, ¶ 21, 29 P.3d 271, 276 (2001), *quoting State v. Doerr*, 193 Ariz. 56, ¶ 33, 969 P.2d 1168, 1176 (1998). "Error is harmless if we can say

beyond a reasonable doubt that it did not affect or contribute to the verdict." *Doerr*, 193 Ariz. 56, ¶ 33, 969 P.2d at 1176.

¶16 Washington did not present any evidence that the sexual acts were in fact consensual. Rather, at trial, he attempted to manufacture the possibility of consent by questioning the victim's failure to escape. But the victim testified specifically that he had not consented to the acts, and the events Washington questioned at trial were insignificant to the issue of consent. *See* § 13-1401(5). Thus, we can say beyond a reasonable doubt that the jury would not have accepted the consent defense in any event, and we conclude that the erroneous jury instruction was harmless error. *See Doerr*, 193 Ariz. 56, ¶ 33, 969 P.2d at 1176.

Conclusion

¶17 In light of the foregoing, we affirm Washington's convictions and sentences.

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

PHILIP G. ESPINOSA, Presiding Judge

VIRGINIA C. KELLY, Judge